Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO S24–56 OF 1999
IAN CHIN J
11 DECEMBER 2002

Civil Procedure *— Jurisdiction — High Court — Whether High Court has jurisdiction to interpret state law concerning the administration of Islamic law*

Family Law *— Children — Minor's religion — Constitutional right to decide religion of minor — Whether such right conferred on both father and mother of infant — Federal Constitution art 12(4)*

Family Law *— Children — Custody — Mother's right to custody of infant — Whether right to custody includes the right to decide on infant's religious education — Whether such right violated by father's unilateral decision to allow conversion of infant*

Islamic Law *— Conversion — Validity — Conversion of two-year-old child — Child converted with permission of father but without knowledge of mother — Child unable to utter or comprehend the Arabic Affirmation of Faith clauses — Child not of the age of 'baligh' at time of conversion — Whether conversion of child to Islam valid — Whether conversion contrary to the Sabah Administration of Islamic Law Enactment 1992*

Words and Phrases *— 'Guardian' — Sabah Administration of Islamic Law Enactment 1992 s 68*

Words and Phrases *— 'Parent' — Federal Constitution art 12(4)*

Words and Phrases *— 'Parents' — Sabah Administration of Islamic Law Enactment 1992 s 68*

This case concerned the legality of an infant girl's conversion to Islam and the High Court's jurisdiction to interpret state law concerning the administration of Islamic law. The infant's father converted to Islam on 23 January 1998 without the knowledge of his wife — the plaintiff and the infant's mother. On 17 July 1998, the infant was also converted to Islam without the plaintiff's consent. On 28 July, the father obtained an order from the Syariah lower court declaring his marriage null and void and granting him custody of the infant. The Syariah High Court subsequently reversed this order on 4 November 1998. On 13 November 1998, the High Court at Kota Kinabalu granted the plaintiff custody of the infant. The plaintiff subsequently applied to declare null and void the infant's conversion to Islam on 17 July 1998 by the first defendant. In her application, the plaintiff questioned the legality of the infant's conversion whereas the defendants questioned the High Court's jurisdiction to hear and determine the application. In determining the case, the High Court

had to, inter alia, interpret the word 'parents' in s 68 of the Sabah Administration of Islamic Law Enactment 1992 ('the Enactment') which provision required the consent of parents to the conversion to Islam of a person below 18 years of age. The defendants argued that the word 'parents' in s 68 had to be interpreted as the singular 'parent'. According to the defendants, if s 68 were to be read to require the consent of both parents, it would be inconsistent with art 12(4) of the Federal Constitution, which claimed the defendants, required only the consent of a parent for matters pertaining to the choice of an infant's religion.

Held, granting the declaration sought with costs to the plaintiff:

(1) The term 'parents' in s 68 of the Enactment is in the plural which literal and ordinary interpretation means the father and mother. The word 'guardian' in s 68 of the Enactment must also be taken to mean both father and mother as they have equal rights under the Guardianship of Infants Ordinance, which Ordinance deals extensively with the duties of a guardian (see p 111B–E).

(2) The Federal Constitution does not discriminate against the sexes and since the father and the mother have equal rights over the person and property of an infant, the term 'parent' in art 12(4) must necessarily mean both the father and mother if both are living. To allow just the father and mother to choose the religion would invariably mean depriving the other of the constitutional right under art 12(4). Thus, the term 'parents' in s 68 of the Enactment does not conflict with art 12(4) as art 12(4) confers the right on both the father and the mother (see p 112D–E).

(3) The plaintiff had a right to custody of her infant which right included deciding on the religious education of the infant. That right had been violated by the husband when he gave permission for the infant to be converted. Apart from the plaintiff's right, the Koran states that there shall be no compulsion in religion which means that the plaintiff and through her the infant, cannot and should not be compelled to go to Islamic religious school (see p 113B–E).

(4) Apart from the required consent of the parents or guardian, by virtue of s 69 of the Enactment, the two-year-old infant had to be able to utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith and to know their meanings as well. It is recognized by the Enactment that in order to recite and to know the meanings of the clauses, a person must be of the age of *baligh* — meaning of full age or adulthood. In the instant case, the infant was clearly not of the age of *baligh* and thus her conversion was against the Enactment (see p 114A–E).

(5) What was involved in the instant case concerned the interpretation of a state law — s 68 of the Enactment. A civil court

has the jurisdiction to do so even if the state law is one concerning the administration of Islamic law (see p 115G); *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar dan lain-lain* [2002] 4 MLJ 130 followed.

[Bahasa Malaysia summary

Kes ini berkaitan kesahan seorang kanak-kanak perempuan memeluk agama Islam dan bidang kuasa Mahkamah Tinggi menafsirkan undang-undang negeri berkaitan pentadbiran undang-undang Islam. Bapa kanak-kanak tersebut telah memeluk agama Islam pada 23 Januari 1998 tanpa pengetahuan isteri beliau — plaintif dan ibu kanak-kanak tersebut. Pada 17 Julai 1998, kanak-kanak tersebut juga telah memeluk agama Islam tanpa persetujuan plaintif. Pada 28 Julai, bapa tersebut telah memperoleh satu perintah daripada mahkamah rendah Syariah yang mengisytiharkan perkahwinan beliau batal dan tidak sah dan memberikan beliau hak penjagaan ke atas kanak-kanak tersebut. Mahkamah Tinggi Syariah kemudiannya telah mengakaskan perintah itu pada 4 November 1998. Pada 13 November 1998, Mahkamah Tinggi di Kota Kinabalu telah memberikan plaintif hak penjagaan ke atas kanak-kanak tersebut. Plaintif kemudiannya telah memohon untuk diisytiharkan batal dan tidak sah pemelukan agama Islam kanak-kanak tersebut pada 17 Julai 1998 oleh defendan pertama. Dalam permohonan beliau, plaintif mempersoalkan kesahan pemelukan agama kanak-kanak tersebut manakala defendan-defendan telah mempersoalkan bidang kuasa Mahkamah Tinggi untuk mendengar dan menentukan permohonan tersebut. Dalam menentukan kes tersebut, Mahkamah Tinggi harus, antara lain, menafsirkan perkataan 'parents' dalam s 68 Enakmen Undang-Undang Islam Pentadbiran Sabah 1992 ('Enakmen tersebut') di mana peruntukan tersebut memerlukan persetujuan ibubapa untuk pemelukan agama Islam bagi seseorang di bawah 18 tahun. Defendan-defendan telah berhujah bahawa perkataan 'parents' dalam s 68 harus ditafsirkan sebagai 'parent' tunggal. Menurut defendan-defendan, jika s 68 dibaca sebagai memerlukan persetujuan kedua-dua ibubapa, ia adalah tidak konsisten dengan perkara 12(4) Perlembagaan Persekutuan, yang mana defendan-defendan, menyatakan hanya memerlukan persetujuan seorang ibu/bapa bagi perkara-perkara berkaitan pilihan agama seorang kanak-kanak.

Diputuskan, memberikan deklarasi yang dipohon dengan kos kepada plaintif:

(1) Terma 'parents' dalam s 68 Enakmen tersebut adalah berbentuk jamak di mana secara harfiah dan tafsiran biasa bermaksud bapa dan ibu. Perkataan 'guardian' dalam s 68 Enakmen tersebut juga harus membawa maksud kedua-dua bapa dan ibu kerana

A mereka mempunyai hak-hak yang sama di bawah Ordinan Penjagaan Budak, di mana Ordinan tersebut membincangkan secara terperinci tentang tanggungjawab seorang penjaga (lihat ms 111B–E).

(2) Perlembagaan Persekutuan tidak membuat perbezaan jantina dan B memandangkan seorang bapa dan seorang ibu mempunyai hak yang sama ke atas diri dan hartanah kanak-kanak, terma 'parent' dalam perkara 12(4) hendaklah semestinya bermaksud bapa dan ibu jika kedua-duanya masih hidup. Dengan membenarkan hanya seorang bapa dan ibu untuk memilih agama akan bermaksud mengkilankan yang satu lagi hak perlembagaan di bawah perkara C 12(4). Oleh itu, terma 'parents' dalam s 68 Enakmen tersebut tidak boleh bercanggah dengan perkara 12(4) kerana perkara 12(4) memberikan hak ke atas kedua-dua bapa dan ibu (lihat ms 112D–E).

(3) Plaintif mempunyai hak penjagaan ke atas anak beliau D termasuklah hak menentukan pendidikan agama kanak-kanak tersebut. Hak tersebut telah dicabuli oleh bapa tersebut apabila beliau memberi kebenaran kanak-kanak tersebut bertukar agama. Selain daripada hak plaintif, Quran menyatakan bahawa tidak sepatutnya wujud pemaksaan dalam agama di mana ia bermaksud plaintiff dan melalui beliau kanak-kanak tersebut, tidak boleh dan E tidak sepatutnya dipaksa untuk ke sekolah agama Islam (lihat ms 113B–E).

(4) Selain daripada keperluan persetujuan ibubapa atau penjaga, menurut s 69 Enakmen tersebut, kanak-kanak berumur dua tahun tersebut harus boleh mengucapkan dua kalimah syahadat F dan mengetahui maksudnya sekali. Ia adalah diikhtiraf oleh Enakmen tersebut bahawa bagi tujuan mengucap dan mengetahui maksud ungkapan-ungkapan tersebut, seseorang mestilah baligh umurnya — maksudnya telah dewasa. Dalam kes semasa, kanak-kanak tersebut masih belum baligh dan oleh itu penukaran agama G beliau adalah bertentangan dengan Enakmen tersebut (lihat ms 114A–E).

(5) Apa yang wujud dalam kes semasa adalah berkaitan taksiran undang-undang negeri — s 68 Enakmen tersebut. Sebuah mahkamah sivil mempunyai bidang kuasa untuk berbuat H demikian walaupun undang-undang negeri adalah berkaitan pentadbiran undang-undang Islam (lihat ms 115G); *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar dan lain-lain* [2002] 4 MLJ 130 diikut.]

I **Notes**

For cases on child custody, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2653–2673.

For cases on jurisdiction of the High Court, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3724–3775.
For cases on a minor's religion, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2708–2709.
For cases on the validity of conversions, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) para 436.

Cases referred to

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar dan lain-lain [2002] 4 MLJ 130 (folld)

Legislation referred to

Administration of Islamic Law Enactment 1992 ss 68, 69
Federal Constitution arts 12(4), 75
Guardianship of Infants Ordinance s 5
Law Reform (Marriage and Divorce) Act 1976 ss 51(2), 88(3), 89(1)

Edwin Tsen (*Tan Pang Tsen & Co*) for the plaintiff.
Athmat Hassan (*Razali Tazi*) for the first and second defendants.

Ian Chin J:

Introduction

This is an application, filed on 10 August 1999, by the plaintiff, Chang Ah Mee, who is the mother of one Junior Staphie Khoo ('the infant') for a declaration that the conversion on 17 July 1998 by the Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah of her daughter to a Muslim be declared null and void.

Facts of the case

In 1995, the plaintiff was married to one Khoo Tak Jin ('the father') out of which wedlock the infant was born in 1996. Then unbeknown to the plaintiff the father converted to the Islamic faith on 23 January 1998 and the infant was also converted on 17 July 1998 without the consent of the plaintiff. Then on 28 July 1998 the father obtained an order from the Syariah lower court declaring his marriage null and void and granting him custody of the infant but this order was subsequently reversed by the Syariah High Court on 4 November 1998. This High Court then on 13 November 1998 granted custody to the plaintiff pursuant to an application made in a pending proceeding. The facts present no problem. It is the jurisdiction of this court to hear the present application that is being called into question by all the defendants while the plaintiff questions the legality of the conversion of the infant to Islam which latter issue I will deal with first.

Legality of conversion

This issue has nothing to do with religion but with the interpretation of the provisions of a Sabah legislation called the Administration of Islamic Law Enactment 1992 ('the Enactment'), more particularly s 68 which reads:

> For the purpose of this Part, a person who is not a Muslim may convert to Islam if he attains the age of *baligh* according to Islamic Law and provided that if a person is below eighteen (18) years of age consent shall be obtained from the parents or his guardian.

The term 'parents' mentioned in that section is in the plural which literal and ordinary interpretation means the father and the mother (or persons acting as such) while the singular form would mean either the father or the mother. But that section also confers upon a guardian the right to give consent. The conjunction 'or' indicates that either the parents or the guardian could give consent. The term 'guardian' and his duties are dealt with extensively by the Guardianship of Infants Ordinance (Cap 54) ('the Ordinance') which contain provisions for the guardianship of infants. Before the amendment on 1 September 1999, s 5 of the Ordinance gave the father the primary right over the person and property of an infant but the amendment gave both the father and the mother the same and equal right but such equal right is illusory unless it means that the husband and the wife must exercise them jointly, that is, it cannot be exercised by the one without the other save when the other has died. Therefore when s 68 of the Enactment refers to a guardian, it must be taken to mean both the mother and the father as they have equal right under the Ordinance.

As for the matter of the choice of religion for an infant, the law is to be found not only in the Enactment, but also in art 12 of the Federal Constitution ('the Constitution') which says:

> Rights in respect of education
>
> (1) Without prejudice to the generality of art 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth —
>
> (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or
>
> (b) in providing out of the funds of a public authority, financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).
>
> (2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in

providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose. A

(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

(4) For the purposes of cl (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian. B

It will be noticed that art 12(4) speaks of 'parent' in the singular form which led the defendants to argue that s 68, when it requires the consent of both parents is inconsistent with art 12(4) which requires the consent of a parent and that when an inconsistency occurs, the Constitution prevails and this is stipulated in art 75 which reads: C

> If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

Thus, 'parents' in the Enactment shall have to be read as 'parent', argued the defendants. But I am unable to accept that argument. The Constitution D does not discriminate against the sexes and since the father and the mother have equal right over the person and property of an infant, the term 'parent' in art 12(4) must necessary mean both the father and the mother if both are living. To construe otherwise would mean depriving, for example, a mother of her right as a parent to choose the religion of the infant under art 12(4), E if the father alone decides on the religion to be followed by the infant. To allow just the father or the mother to choose the religion would invariably mean depriving the other of the constitutional right under art 12(4). Therefore, the term 'parents' used in s 68 does not conflict with art 12(4) as art 12(4) confers the right on both the father and the mother (when they are both living). F

However, the plaintiff has one right which may not be easily discernible. That right can arise when the husband converted to Islam. The conversion of one spouse to Islam entitles the other party who has not converted to petition for divorce though the petition cannot be presented until the expiration of three months from the date of the conversion. The husband's G conversion took place on 23 January 1998 while that of the infant on 28 July 1998 when she was only two years old. A petition for divorce was filed on date unknown and the custody of the infant was given to the plaintiff in January 2002. When such a petition is presented: 'The court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and H may attach any conditions to the decree of the dissolution as it thinks fit' (s 51(2) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act')). The primary right of the father to be the guardian would be displaced when the court considers to whom custody of the infant would be given because s 88(3) of the Act says: I

> There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether

A that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

Where custody is given to a spouse, it entitled the custodian to 'decide all questions relating to the upbringing and education of the child' (s 89(1) of B the Act) which, to my mind, would include deciding what religious education the infant should have. But that right, which the plaintiff would have had, had the husband not converted the infant to Islam, has been violated by the husband when he gave permission for the defendants to have the infant converted. But the plaintiff still has the right since the court has given her custody of the infant 'to decide on all questions relating to the C upbringing and education of the child'. It is only in this manner, in my view, that the plaintiff can argue that her right was violated and that in the circumstances of this case, that is because of her right to custody and to decide on the religious education of the infant, that her consent should have been obtained. But then art 12(4) does not appear to contain any restriction D on the right of the husband to decide to have the infant converted at anytime, that is, even during the time when a right has accrued to the plaintiff to divorce him and to have custody of the infant, as a result of the husband's conversion to Islam. Now, we have a situation of the plaintiff having the right to decide on the religious education of the infant who does not want the child to undergo any religious education of the Islamic faith E and can thus lawfully send the infant to any religious education other than Islam but yet have a child who has already been converted to Islam. Quite apart from that right of the plaintiff, the Koran (surah al-Baqarah, ayat 256) also states that there shall be no compulsion in religion which means that the plaintiff and, through her, the infant cannot and should not be F compelled to go to Islamic religious school.

A matter not discussed is the issue of whether there was a valid conversion. Section 69 of the Enactment spells out the requirements for conversion in these words:

G (1) The following requirements shall be complied with for a valid conversion of a person to Islam:

(a) the person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith;

(b) at the time of uttering the two clauses of the Affirmation of Faith the H person must be aware that they mean 'I bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad SAW is the Messenger of Allah'; and

(c) the utterance must be made of the person's own free will.

I (2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of para (a) of sub-s (1), utter the two clauses of the Affirmation of Faith by means of signs that convey the meaning specified in para (b) of that subsection.

So, quite apart from the consent from the parent or guardian being required, the infant, in this case a two-year old, must be able to utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith and to know their meaning as well. The two clauses look like this:

أَشْهَدُ أَنْ لَا إِلٰهَ إِلَّا اللّٰهُ وَأَشْهَدُ أَنَّ مُحَمَّدًا رَسُوْلُ اللّٰهِ

It is recognized by the Enactment that the person, in order to recite and to know the meaning must be of the age of *baligh*. I readily understand why learned counsel for the plaintiff would not understand what that term means but I expect the three learned counsel for the defendants to know its meaning and inform the court of it. They did not and in the end I have to go on my own to find out what that means which is not a difficult task because the court has a *Kamus Dewan* (3rd Ed) which defines *baligh* in Malay as being:

> Cukup umur atau dewasa (mengikut pandangan Islam), biasanya apabila mencapai umur antara 9–12 tahun bagi perempuan dan 12–15 tahun bagi lelaki.

Clearly then, *baligh* is the Arabic word meaning of full age or adulthood and in Islam as far as a boy is concerned it is between the age of twelve and fifteen while for a girl it is between the age of nine and twelve. It is, therefore, beyond argument that the infant is not of the age of *baligh* and the conversion is therefore against that Enactment. Even if it is so, it was argued by the defendants, this court has no jurisdiction to say so which is the next issue I will concern myself with.

Jurisdiction to declare conversions as being against the law

What is involved in this case is the interpretation of a state law and that is s 68 of the Enactment and the Court of Appeal had only very recently in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar dan lain-lain* [2002] 4 MLJ 130 (CA) said that a civil court has the jurisdiction to do so even if the state law is one concerning the administration of Islamic law.

Conclusions

I would therefore declare that the conversion by the first defendant of the infant, Junior Staphie Khoo, on 17 July 1998 to Islam, the naming of her as Faridah Ibrahim Khoo and the issuance of the certificate by the second defendant in respect of the conversion and the naming is null and void as the conversion was against s 68 of the Enactment as the infant being only

two years old then has not attained the age of *baligh*. Costs to the plaintiff against all the defendants.

Declaration sought granted with costs to the plaintiff.

Reported by Andrew Christopher Simon